IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.2228 OF 2004

IN

SUIT NO.316 OF 2004

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Russy K. Karanjia & Anr. ...Plaintiffs

v/s.

Kusum Madgaonkar & Anr. ...Defendants

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Mr.Anuj Narula i/b M/s Jhangiani, Narula & Associates for the Plaintiffs.

Mr.Shailesh Shah i/b M/s.Pandya & Poonawala for Defendant No.1.

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CORAM: D.K.DESHMUKH, J.

DATED: 25TH AUGUST,2005

P.C.:

1. This Notice of Motion is taken out by the Plaintiffs. The suit of the plaintiffs is for a decree of specific performance of the agreement at Exh.C whereby the Defendant No.1 agreed to sell part of the premises to the Plaintiffs for Rs.41,000/-.

2. When the agreement was entered into, the Defendant No.1 had not yet become the owner of the premises. It appears that the flat was held by the Defendant No.1 as a tenant. Agreement dated 23rd August, 1993 was entered into by the parties by which firstly the Defendant No.1 agreed to create sub-tenancy of part of the premises in favour of the Plaintiffs and thereafter it was provided that in case the Defendant No.1 becomes the owner of the premises by purchasing the flat from the landlord, the premises in relation to which the sub-tenancy was created in favour of the Plaintiffs, those premises will be transferred in favour of the Plaintiffs for Rs.41,000/-. It appears that on 13-11-1993 the agreement of sub-tenancy was signed between the

parties. The landlord did not transfer the premises in favour of the Defendant No.1 and therefore the Defendant No.1 was required to launch litigation against the landlord for getting the premises transferred. Even after the premises were transferred in favour of the Defendant No.1, neither the Defendant No.1 intimated the Plaintiffs that he has now become the owner of the premises nor did he take any steps to perform his obligation under the agreement dated 23rd August, 1993. After the Plaintiffs came to know because of the public notice issued that the Defendant No.1 has now become the owner of the premises, a notice was issued to the Defendant No.1 asking him for specific performance of his part of the contract.

3. The stand of the Defendant No.1 was denial of the whole thing. In the alternative it was stated that due to passage of time the price of Rs.41,000/- agreed upon is now inadequate. In the written statement filed, the stand of the Defendant No.1 is that the agreement dated 23rd August, 1993 was cancelled subsequently and for that reliance was placed on the agreement dated 13th November, 1993, whereby the sub-tenancy was created in favour of the

Plaintiffs. It is submitted that because the sub-tenancy agreement does not refer to the agreement for sale, the agreement for sale gets cancelled. Then it is submitted that an inference should be drawn from the conduct of the Plaintiffs of not asking for specific performance for all these years that the agreement to sell was cancelled.

4. The submission made on behalf of the Defendant No.1 appears to be devoid of any substance. Perusal of the agreement shows that that agreement was in two parts, by first part of the agreement the parties agreed to create sub-tenancy of part of the premises in favour of the Plaintiffs with the permission of the landlord. It appears that by that time the landlord had already agreed to transfer the ownership of the premises to the Defendant No.1. Therefore, the second part of the agreement was that after the Defendant No.1 becomes the owner of the premises, the part in relation to which sub-tenancy was created in favour of the Plaintiffs would be transferable to the Plaintiffs for Rs.41,000/-. Agreement of sub-tenancy was entered into on 13-11-1993. Obviously, therefore, there was no occasion to mention the other part of the agreement which was for sale of the

premises. Therefore, omission or lack of reference to the agreement for sale in the agreement by which sub-tenancy is created would not lead one to an inference that the agreement for sale was cancelled. So far as the alleged inaction on the part of the Plaintiffs is concerned, at no point of time admittedly the Defendant No.1 informed the Plaintiffs that now the Defendant No.1 has become the owner of the premises. Really speaking in view of the agreement itself it was the duty of the Defendant No.1 to inform the Plaintiffs that now he has acquired the ownership of the flat and therefore he is willing to perform his part of the contract. The Defendant No.1 failed to discharge his duty by failing to inform the Plaintiffs about the acquisition of ownership by him. The Defendant No.1 cannot take advantage of his own failure and default and contend that the Plaintiffs should be disbelieved in so far as the existence of agreement for sale is concerned, because they did not take steps.

5. Taking overall view of the matter, therefore, it appears that there is an agreement to sell the property. But the Defendant No.1 is now finding it inconvenient and therefore he is trying to wriggle

out of his obligation. The learned Counsel appearing for the Plaintiffs states that the Plaintiffs are willing to deposit Rs.41,000/- in the court. In my opinion, therefore, following order would meet the ends of justice.

O R D E R

(i) Notice of Motion is granted in terms of prayer clause (a), subject to the condition that within a period of two weeks from today the Plaintiffs shall deposit in this court an amount of Rs.41,000/-.

(ii) The amount on being deposited, shall be invested in fixed deposit in any nationalised bank during the pendency of the suit.

(iii) Failure of the Plaintiffs to deposit the amount as aforesaid within the aforesaid time will result in dismissal of this Notice of motion automatically.

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